STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

TOWNSHIP OF WASHINGTON,
a Michigan municipal corporation,

Plaintiff,

vs. Case No. 2006-1662-CZ

REVISED AND RESTATED GRACE AIKMAN REVOCABLE LIVING TRUST and CHARLES EDSEL AIKMAN – SUCCESSOR TRUSTEE,

Defendants.

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OPINION AND ORDER

Defendants have filed a motion for summary disposition.

Plaintiff filed this complaint on April 19, 2006. Plaintiff alleges that decedent Grace Aikman executed an amendment to the Revised and Restated Grace Aikman Revocable Living Trust ("the trust"), providing that her real estate located on the northwest corner of Old Van Dyke and 29 Mile Roads be offered for sale to Washington Township at the market price. The trust goes on to provide that "[i]f Washington Township does not purchase the real estate, the Trustees of the trust shall distribute in accordance" with other provisions of the amendment.

Plaintiff alleges that it was notified of its interest in the realty at issue on December 21, 2005. Plaintiff in turn notified counsel for the trust and successor trustee Charles Edsel Aikman that it wished to accept the offer to sell and purchase the realty in accordance with the trust amendment. Plaintiff alleges that it subsequently obtained a written appraisal of the realty establishing a market value of $485,000.00 for the parcel. Plaintiff alleges that it submitted a

purchase agreement to counsel for the trust and successor trustee on March 20, 2006. Plaintiff claims that defendants rejected the purchase agreement on March 29, 2006 based on their belief that $485,000.00 did not accurately reflect the market value of the property. Plaintiff therefore brings Count I, for specific performance of the trust amendment, and Count II, for a declaratory judgment concerning plaintiff's interest in the realty.

Defendants move for summary disposition pursuant to MCR 2.116(C)(7), (C)(8) and (C)(10). MCR 2.116(C)(7) permits summary disposition where the claim is barred because of any one of several occurrences. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id.*

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439

Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of the plaintiff's claim. *Outdoor Advertising v Korth*, 238 Mich App 664, 667; 607 NW2d 729 (1999). The Court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of material fact exists to warrant a trial. *Id.* The Court must resolve all reasonable inferences in the nonmoving party's favor. *Id.*

In support of their motion for summary disposition, defendants argue that the trust amendment does not satisfy the statute of frauds since it lacks a legally sufficient description of the subject property. Defendants also assert that the amendment does not specify the exact price of the property, does not indicate the method or time for performance, and is not signed by the party to be charged. Defendants argue that plaintiff's appraisal was inaccurate as a matter of law, and that plaintiff therefore failed to offer fair market value for the property. Lastly, defendants claim that the purchase agreement submitted by Washington Township constitutes a counter-offer to purchase the property, rather than an exercise of their option to purchase.[1]

In response, plaintiff urges that the description of the property contained in the trust amendment was sufficient. Plaintiff notes that there has never been any bona fide dispute as to the identity of the property at issue. Plaintiff claims that the trust amendment itself constitutes an offer to sell the property, and that the purchase agreement that it submitted was an acceptance of this offer. Plaintiff also maintains that the terms of the trust amendment were adequate to create an enforceable option to purchase. Next, plaintiff argues that defendants erroneously refer to

[1] In their motion, defendants also appear to suggest that the trust amendment was procured by untoward means, but defendants do not actually argue that the allegedly questionable circumstances under which the amendment was procured would serve as a basis for summary disposition. As such, the Court shall not address this issue further.

plaintiff's alleged rights under the trust amendment as "a right of first refusal." Therefore, plaintiff urges that it is not required to match an offer submitted by a third party, but rather has an absolute right to purchase the property at market price. Finally, plaintiff alleges that the parties' dispute concerning the market value of the subject property is a genuine issue of material fact, and cannot be determined as a matter of law.

The trust amendment provides, in pertinent part:

> Settlor's real estate at the Northwest corner of Old Van Dyke and 29 Mile Roads shall be offered for sale to Washington Township at the market price. If Washington Township does not purchase the real estate, the Trustees of the trust shall distribute it in accordance with paragraph Y, of Article III immediately following.

The Court shall first address defendant's argument that the trust amendment does not satisfy the statute of frauds, and must fail for lack of a legally sufficient description of the subject property. Any trust or power over or concerning lands must be created by a writing subscribed by the party to be charged. See MCL 566.106. The same holds true for contracts concerning the sale of lands. See MCL 566.108. In the case at bar, the parties do not dispute that a trust amendment giving rise to the type of interest claimed by plaintiff must satisfy the statute of frauds. The first question squarely before the Court is thus whether the description of the property contained in the trust amendment is legally sufficient.

The description of realty in a contract for the sale of land satisfies the statute of frauds if it discloses the grantor's intent as to the quantity and location of the land so that identification is practicable. *Zurcher v Herveat*, 238 Mich App 267, 282; 605 NW2d 329 (1999) (citation omitted). Furthermore, "parole evidence is admissible to supplement, but not contradict, the understanding of the parties." *Stanton v Dachille*, 186 Mich App 247, 259; 463 NW2d 479 (1990), citing *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 367; 320 NW2d 36

(1982). Therefore, the "description is sufficient if when read in the light of the circumstances of possession, ownership, situation of the parties, and their relation to each other and to the property, as they were when negotiations took place and the writing was made, it identifies the property." *Stanton, supra* at 259 (citations omitted).

Based on various exhibits submitted by the parties to this litigation, it appears that defendant trust actually owns two parcels on the northwest corner of Old Van Dyke and 29 Mile Road. Inscrutably, defendants do not address this issue in their motion for summary disposition. However, to the extent that the trust owns two separate parcels satisfying the description of the property contained in the trust amendment, the description alone presumably fails to adequately disclose Grace Aikman's intent as to the quantity and location of the property at issue. Nevertheless, parole evidence presented suggests that the parties intended the agreement to concern both parcels. For instance, an addendum to defendants' agreement of sale with Antoine Abi Raji[2] concerns two parcels, commonly known as 11551 29 Mile Road and 11467 29 Mile Road, and provides that the sale of these parcels is conditioned upon Washington Township "not exercising it's [sic.] Right of First Refusal within seven (7) days of such notification from sellers."[3] Plaintiff's Exhibit B, Second Addendum to Agreement of Sale, provision 2. Moreover, it is noteworthy that defendants do not claim that there is or ever has been any bona fide dispute concerning the identity of the subject property. Since the issue of parole evidence concerning the parties' intention has not been adequately addressed by either party, the Court finds that summary disposition because of an allegedly inadequate description of the property would be inappropriate at this time.

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[2] Once again based on the parties' exhibits, it appears that Mr. Raji is a third party whose attempt to purchase the property led to plaintiff being notified of its option to purchase under the trust amendment.

[3] As discussed *infra*, plaintiff disagrees with this characterization of its interest under the trust amendment.

Next, the Court disagrees with defendants' allegation that the trust must fail for not specifying the exact price of the property. Defendants have cited no authority in support of this proposition, and the Court is aware of none. However, the Court notes that the purchase price is specified as the "market price" of the property. The use of this term in the trust amendment is understandable, given the fact that the market price could change between the time the trust amendment was executed and the time plaintiff attempted to exercise its option to purchase. Therefore, while "market price" is not an exact price, the term is not so indefinite as to invalidate the trust amendment, and summary disposition will not be granted on this basis.

The Court also disagrees with defendants' allegation that the trust must fail for not specifying the time or method of payment. When no time for payment is indicated, the courts will presume that the parties intended for payment to be made within a reasonable time. See, e.g., *Bruno v Zwirkoski*, 124 Mich App 664, 335 NW2d 120 (1983) (citation omitted). Likewise, absent terms concerning the method of payment, courts will presume that the payment be made in cash. See, e.g., *Barton v Molin*, 219 Mich 347, 351; 189 NW 74 (1922). Therefore, the failure of the trust amendment to specify these terms is not fatal, but rather simply requires that the Court infer that the parties' intended that plaintiff could exercise its option by making a cash payment for the property within a reasonable time.

Defendants also assert that the purported trust amendment is not signed by the party to be charged. This contention, however, is facially spurious, as the trust amendment is clearly signed by decedent Grace Aikman, both in her capacity as settlor and as trustee of the trust. See Defendants' Exhibit B, First Amendment to the Revised and Restated Grace Aikman Revocable Living Trust Agreement.

Next, in order to determine whether plaintiff's refusal to match the offer which defendants received from Mr. Raji terminated plaintiff's interests under the trust, the Court must decide whether the trust amendment gave plaintiff a right of first refusal or an option to purchase. An option to purchase is an agreement "by which the owner of the property agrees with another that he shall have a right to buy the property at a fixed price within a specified time." *Oshtemo Twp v Kalamazoo*, 77 Mich App 33, 37; 257 NW2d 260 (1977). A right of first refusal is a conditional option to purchase dependent upon the landowner's desire to sell. *Brauer v Hobbs*, 151 Mich App 769, 775-776; 391 NW2d 482 (1986).

Turning to the language of the trust amendment, the provision at issue mandates that the realty at issue "*shall* be offered for sale to Washington Township at the market price" (emphasis added). This language is mandatory, and there is no suggestion that the township's right to purchase the property is conditioned upon either (1) the trustee independently deciding to sell or (2) plaintiff matching any other offers which the defendants received for the property. Had a right of first refusal been intended, at the very least the amendment should have specified that the realty *first* be offered for sale to Washington Township.[4] The Court is therefore satisfied that plaintiff's option to purchase was not subject to the conditions of a right of first refusal. To the contrary, plaintiff had the right to purchase the realty at market price regardless of the price offered by third parties. As such, summary disposition cannot be granted simply because plaintiff did not match the offer defendants received from Mr. Raji.

The Court now turns to defendants' contention that plaintiff's offer to purchase does not approximate the fair market value of the property at issue. Generally speaking, ascertainment of

[4] Michigan caselaw suggests that the inclusion of phrases such as "right of first refusal," "first option to purchase," "first option," and "first privilege" indicate the existence of a right of first refusal as opposed to an option to purchase. See generally *Czapp v Cox*, 179 Mich App 216; 445 NW2d 218 (1989).

market value is a question of fact for the jury. See, e.g., *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116, 137; 680 NW2d 485 (2004). In the present case, (1) defendants' appraisal of the property placed its market value at $2,350,000.00, (2) defendants allegedly received an actual offer to purchase the property for $2,200,000.00, but (3) plaintiff's appraisal suggested a market value of $485,000.00. The Court notes that defendants' appraisal treated the property as if it had been re-zoned as a commercial property, whereas plaintiff's appraisal was based on the property's current zoning designation. As such, the parties' appraisers apparently have at least some disagreement concerning the most appropriate way of estimating market value. In cases were appraisers "disagree about the *best* way of estimating that market value, . . . their disagreement is a question of fact for the trier of fact to resolve, not a question of law for the courts to decide." *In re Acquisition of Billboard Leases and Easements*, 205 Mich App 659, 662-663; 517 NW2d 872 (1994). Further, neither party has directed the Court's attention to any authority suggesting whether either method of appraising property is more widely accepted for purposes of determining market value. For all of these reasons, the Court cannot determine as a matter of law which determination of market price is controlling, and summary disposition on this basis is inappropriate.

The Court also disagrees with defendants' suggestion that the "agreement to purchase real estate" which plaintiff sent to defendants was a counter-offer simply because the price plaintiff offered was considerably lower than the price offered by Mr. Raji. As discussed above, there is a genuine issue of material fact concerning the market value of the realty. Since plaintiff's proposed purchase agreement at least arguably reflected the market value of the realty, the Court is satisfied that plaintiff's proposed purchase agreement was an attempt to exercise its

option rather than a counter-offer. Summary disposition cannot be granted simply because defendants attempted to exercise their option.

Finally, the Court notes that both parties have requested attorney fees and costs in relation to this motion. However, there is no indication that either party's position with respect to this motion is frivolous or otherwise vexatious. Therefore, the Court finds that attorney fees and costs are not warranted in this matter.

For the reasons set forth above, defendants' motion for summary disposition is DENIED, and defendants' request for attorney fees and costs is also DENIED. Plaintiff's request for attorney fees and costs is likewise DENIED. Pursuant to MCR 2.602(A)(3), this Opinion and Order neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

Diane M. Druzinski, Circuit Court Judge

Date: JUL 25 2006

DMD/aac

cc: Robert J. Seibert, Attorney at Law
Henry A. Sachs, Attorney at Law

DIANE M. DRUZINSKI
CIRCUIT JUDGE

JUL 25 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: _____ Court Clerk